

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

SECOND APPEAL NO. 650 OF 2012
WITH
CIVIL APPLICATION NO. 732 OF 2013

Vishwanath Keshav Gavande
Age: 60 years, Occu: Agril.,
R/o. Kasli, Tq. Jamner, Dist. Jalgaon

... Appellant
(Ori. Defendant No.6)

Versus

1. Shankar Motiram Patil
(died)
2. Sau Rahayabai Shankar patil
(died)
3. Kum. Chotibai Shankar patil,
(Since deceased through L.Rs)
- 3-A. Kum. Krushna Ashok Patil,
Age: Minor, natural guardian
of respondent No.3-B.
- 3-B. Shri Ashok Dagadu Patil,
Age: 51 years, Occu: Agril.,
R/o. Bilwadi,
Tq. Jamner, Dist. Jalgaon
4. Sau. Mathurabai Balu Patil,
Age: 48 years, Occu: Household,
R/o. Kharchand,
Tq. Jamner, Dist. Jalgaon.
5. Sau. Mangalabai Namdeo Patil
Age: 44 years, Occu: Household,
R/o. Loni, Tq. Jamner,
Dist. Jalgaon
6. Shri Prabhakar Shankar Patil
Age: 58 years, Occu: Agril.,
R/o. Khedi-Kodali,
Tq. Erandol, Dist. Jalgaon

... Respondents
(1 to 5 are orig.Defds No. 1 to 5 and
Respondent No.6 is orig. plaintiff)

.....
Mr. Arun V. Rakh, h/f Mr. G. V. Wani, Advocate for appellant
Mr. P. R. Katneshwarkar, Advocate for respondents No. 3-A, 3-B,
4 to 6.

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CORAM : SUNIL P. DESHMUKH, J.

DATE : MARCH 1, 2016

ORAL JUDGMENT :

1. Heard learned counsel for the parties at some length.
2. Appellant – the original defendant No.6 is before this court under present second appeal, aggrieved by concurrent findings in respondent No.6 - plaintiff's favour, one by Civil Judge, Junior Division, Jamner, decreeing Regular Civil Suit No. 153 of 1987 under order dated 15-09-2004 and another by Assistant Sessions Judge, Jalgaon dismissing present appellant's Regular Civil Appeal No. 247 of 2004 on 05-04-2012.
3. Respondent No. 6 – plaintiff had instituted Regular Civil Suit No.153 of 1987 in the court of Civil Judge, Junior Division, Jamner, seeking partition and separate possession of suit property bearing gut No. 142 ad-measuring 1 hectare 69 Aar, situated at village Kasali, taluka Jamner, district Jalgaon claiming that same is a joint family property of plaintiff and defendants No. 1 to 5 (respondents No. 1 to 5).

4. Facts involved as those appear after hearing and about which there is no much dispute are that, defendants No. 1 and 2 had been residents of village Kalamsara, taluka Pachora and they had sold out their property in 1978 and thereafter they had started residing at village Kasali, taluka Jamner.

5. It is the case of plaintiff that the suit property had been purchased from sale proceeds of the properties at village Kalamsara and the property had been purchased in the name of respondent No.2 - defendant No.2 – Rahayabai. Defendant No.2 is mother of plaintiff and defendants No. 3 to 5 and wife of defendant No.1.

6. Defendant No.2 - Rahayabai sold the suit property on 01-02-1988 in favour of present appellant – defendant No.6. Accordingly defendant No.6 had been put in possession. Before the sale transaction had been entered into, the suit had already been filed by plaintiff who is respondent No.6 herein, claiming partition and separate possession of said property.

7. Defendant No.6 on appearance in the suit claimed that the suit property had been purchased by Rahayabai and was her self acquired property and she had sold the same to him.

8. The two courts, trial as well as appellate, on appreciation of evidence, found that the property had been purchased in the name of defendant No.2 Rahayabai, from the sale proceeds of the

property at Kalamsara with little time gap between two transactions. The courts have further found that the appellant - defendant No.6 though claimed that the suit property was the self acquired property of deceased Rahayabai, had not been able to place on record any credible material, showing that Rahayabai had any source of income independent of the sale proceeds of the property at Kalamsara.

9. It has also come on record in the form of evidence that both defendants No. 1 and 2 had been poor and were unable to work. In the absence of any material placed on record by defendant No.6 about Rahayabai having any other independent income source, it would be difficult to accept that suit property might have been purchased by her from separate income.

10. The trial court considered the case accordingly and has come to the conclusion that the suit property had been a joint family property. In the circumstances, the suit was decreed by the trial court, declaring that in the suit property the plaintiff has 1/3rd share and legal representatives of defendants No. 1 and 2 have 2/3rd share and further declared that the sale of the suit field under the sale-deed dated 01/02/1988 in favour of defendant No.6 is not binding on plaintiff's share. The decree by trial court had been confirmed by the appellate court while it dismissed the Regular Civil Appeal No. 247 of 2004 filed by present appellant – original defendant No.6 as stated at the inception.

11. After hearing learned counsel for the parties, it transpires that defendants No. 3 to 5 – three sisters (daughters of defendants No. 1 and 2) have been signatories to the sale-deed executed in favour of appellant – defendant No.6, by their mother – defendant No.2 though they have admitted and supported the claim of the plaintiff. This position has come on record in the evidence of defendant No.6 and has not been rebutted by any other evidence.

12. Learned counsel for appellant has contended that it cannot be said that there was evidence on record to indicate that suit property belonged to joint family and instead of plaintiff, evidence had been given by his power of attorney holder. However, having regard to the relationship between the power of attorney holder and the plaintiff, it cannot be said that the former had no knowledge of the circumstances involved in the case since he happened to be husband of one of the sisters of the plaintiff. It has further come on record that defendant No.6 – appellant himself had admitted to have met with the demands of the plaintiff by making some payments to him. The sale has indisputably taken place during pendency of the suit.

13. Taking stock of the situation, it does not appear to be a case wherein appreciation of the evidence by two courts can be said to be not adhering to the facts on record or is perverse.

14. In the circumstances, second appeal would fail, however with modification clarifying that since the sisters of the plaintiffs undisputedly are signatories to sale-deed executed in favour of appellant – defendant No.6, by their mother – defendant No.2, the sale would bind at least those sisters. In the circumstances, while it comes to giving 1/3rd share of the suit property to the plaintiff, the right of defendant No.6 to balance 2/3rd share may not be affected by clause (iii) of the decree passed on 15-09-2004 by Civil Judge, Junior Division, Jamner in Regular Civil Suit No. 153 of 1987.

15. With the modification - clarifications as aforesaid, second appeal stands disposed of.

16. In view of disposal of second appeal, civil application No. 732 of 2013 does not survive and stands disposed of as such.

(SUNIL P. DESHMUKH, J.)

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